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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/521,579	05/04/2005	Philippe Bertrand	BC-01US	4029
50446 7590 07/30/2009 HOXIE & ASSOCIATES LLC 75 MAIN STREET, SUITE 301 MILLBURN, NJ 07041				
EXAMINER				
CHAWLA, JYOTI				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
07/30/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/521,579

Applicant(s)

BERTRAND ET AL.

Examiner

JYOTI CHAWLA

Art Unit

1794

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 09 July 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
EXAMINER NOTE: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: None.
Claim(s) objected to: _____.
Claim(s) rejected: 1, 4, 8, 10 and 13.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☒ Other: See Continuation Sheet.

/KEITH D. HENDRICKS/
Supervisory Patent Examiner, Art Unit 1794

/JCI/

Continuation of 11. does NOT place the application in condition for allowance because: Continuation of 11. does NOT place the application in condition for allowance because: The arguments filed 7/09/09 have been fully considered and have not been found persuasive.

1. Applicants' arguments against Duffett and Itagaki references separately. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

a) Applicants' argue that "Duffett does not teach or suggest any vegetable fat composition of at least 99% weight cocoa butter". Applicants' seem to arrive at this conclusion based on the observation that Duffett teaches that "cocoa butter or cocoa mass is obtained in liquid form, atomized and the atomized liquid is rapidly cooled to form a powder" (Remarks, page 4, step 1, paragraph 2). This argument is not persuasive because irrespective of how Duffett makes the powder cocoa butter, Duffett still teaches a of powdered form of cocoa butter (e.g., Page 12, line 31 to page 13, line 20), as claimed.

b) Applicants' also argue that Itagaki does not teach a fat containing at least 99% by weight of cocoa butter (Remarks, page 4, last paragraph to page 5, line 3). Itagaki teaches of steam distillation method for deodorizing cocoa butter in the temperature range of 160 °C to 200 °C, which falls in the range of "approximately 160 °C" as disclosed by the applicant, thus, the deodorized cocoa butter of Itagaki includes 90-95% deodorized cocoa butter, as recited. Thus, deodorized cocoa butter was known and available at the time of the invention. Deodorized cocoa butter as taught by Itagaki, does not have a strong flavor, and thus can be advantageously incorporated in food products of various flavors. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Duffett and use deodorized cocoa butter to make the powder form. One of ordinary skill would have been motivated to modify Duffett at least for the purpose of removing the undesirable cocoa butter flavor and making the fat based powdered product more versatile and usable in foods with other flavors, such as vanilla and fruit flavors etc., as taught by Itagaki (Page 3, lines 9-12).

c) Further, regarding applicants' assertion that "present invention is directed to compositions which contain essentially a vegetable fat of at least 99 weight % cocoa butter deodorized 90-95% and it is in the form of a powder" (Remarks, page 5, Paragraph 2), and that "there is no reasonable expectation of success or motivation in practicing the claimed invention" it is noted that the claims are directed to a "A non-gelling gelatin substitution product, wherein it contains essentially a vegetable fat of at least 99 weight % cocoa butter, deodorized to an extent of 90-95%, and is in the form of a powder" which is taught by combination of Duffett and Itagaki as discussed above. Also, one of ordinary skill would have a reasonable expectation of success of obtaining a powdered cocoa butter as taught by Duffett using deodorized cocoa butter as taught by Itagaki.

Further, applicants' claims also recite of incorporating said cocoa butter product in culinary preparations, which is also taught by Duffett and Itagaki as discussed above and in the office action dated 5/8/09.

2. Applicants' argue that Itagaki's "cocoa butter needs to be tempered, but fat compositions which are tempered can hardly be whipped" (Page 5, second last paragraph and page 6, second last paragraph). In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., whipped product) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Applicants' arguments filed 7/9/09 have been considered, however, have not been found persuasive and the rejections of claims 1, 4, 8, 10 and 13 are maintained for reasons of record..

Continuation of 13. Other: Applicant's amendments to claims 4, 8 and 10 in response to the claim objections have been entered and objections raised in claims 4, 8 and 10 have been withdrawn..